



REPUBLIC OF KENYA



KENYA LAW
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**Kahia & another v Wangondu (Civil Appeal 27 of 2018)
[2022] KEHC 14331 (KLR) (26 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14331 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL 27 OF 2018
JN NJAGI, J
OCTOBER 26, 2022**

BETWEEN

PATRICK MUGAMBI KAHIA 1ST APPELLANT

MICHAEL KAHIA MAINA 2ND APPELLANT

AND

BERNARD MWAI WANGONDU RESPONDENT

RULING

1. The applicant has filed an application dated January 4, 2021 seeking for orders that the appeal filed herein be dismissed for want of prosecution and that the firm of Wangechi Gathua Advocates be struck out for coming on record without leave of the court after judgment had been passed in the matter.
2. The application was opposed by the respondents vide the replying affidavit of the 2nd respondent sworn on January 26, 2022.

The Applicant's Case –

3. According to the applicant, the appeal was lodged on May 4, 2018 and set down for directions on February 24, 2020. That it has been one year now since the respondents took steps to set down the appeal for directions and the respondents have not taken any action to prosecute their appeal or set it down for hearing. The applicant therefore contends that the respondents are guilty of prolonged and inordinate delay in prosecuting the appeal and have lost interest in prosecuting it. Further, the applicant contends that the inordinate delay by the respondents is holding him at ransom and is prejudicial to him. He prays that the appeal be dismissed for want of prosecution and costs be awarded to him.



4. The applicant further contends that the firm of Wangechi Gathua Advocates ought to be struck out from representing the respondents because the said firm has not filed a consent to come on record for the respondents yet judgment has been passed.

The Respondents' Case-

5. The respondents contend that they have not lost interest in prosecuting the appeal. That the reason why they have not fixed the appeal for hearing as directed by the court is because they have been experiencing financial challenges as they are unemployed.
6. The respondents further contend that they instructed their advocates on record who filed their notice of appointment on November 10, 2021 after the court directed them to seek representation by counsel.
7. The respondents state that there has been no inordinate delay on their part as they have every intention of prosecuting the appeal to its logical conclusion. They further state that the applicant is the one who is causing the delay of the instant appeal by filing the current application. Consequently, they pray that the application be dismissed with costs.
8. Parties disposed of the application by way of written submissions.

Applicant's Submissions -

9. The applicant submits through his advocates, Magua & Mbatha Advocates, that the respondents filed their memorandum of appeal on May 4, 2018, being an appeal against the judgment of SRMCC No 36 of 2017 Othaya delivered on March 13, 2018. The record of appeal was filed on February 13, 2020 after which the appeal was admitted for hearing. That the court gave directions on February 24, 2020 that a hearing date be taken at the registry. The applicant contends that it's been over 1 year and 11 months now and the appellants have not taken any steps to list the appeal for hearing.
10. The applicant relies on order 42 rules 11, 12 and 13 of the *Civil Procedure Rules* and submits that it is the primary duty of the respondents to move the court to progress the hearing of the appeal. The applicant further makes reference to order 42 rule 35 of the *Civil Procedure Rules* and submits that an appeal may be dismissed after it has been set down for directions. That in the instant matter, directions were taken on February 24, 2020 and a hearing date for the appeal was to be fixed at the registry which has so far not been done. Therefore, that the appeal is ripe for dismissal. To support his contention, the applicant relies on the cases of *Suresh Ruginath Raniga & Another v Sagar Mohan SM Ram Civil Appeal No 433 of 2012 and Kirinyaga General Machinery v Hezekiah Mureithi Ireri HCCC No 98 of 2008* for the proposition that a case may be dismissed for want of prosecution after directions have been taken.
11. The applicant submits that the respondents are guilty of inordinate delay in prosecuting the appeal. That there is delay of 1 year 11 months since the time when directions were taken on February 24, 2020. That the delay is inordinate and unreasonable. The applicant contends that such delay defeats the overriding objective of the *Civil Procedure Rules* which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. Further, the applicant submits that the delay is prejudicial to him as he has been denied the right to enjoy the fruits of the judgment that was delivered in 2018.
12. The applicant contends that the respondents have not given any cogent reasons for the delay. That financial challenges and unemployment are not sufficient reasons to explain the delay and warrant the discretion of the court. That the matter cannot be left hanging until the respondents become financially able to prosecute the appeal. That it can only mean that they have lost interest in the appeal.



In any event, the respondents have not demonstrated what steps they intend to take to ensure the appeal is disposed of. Instead the respondents blame the applicant by alleging that the instant application is a delaying tactic towards the hearing of the appeal. To support his contention, the applicant relies on the case of *Abraham Mukhola Asitsa v Silver Style Investment Company Ltd (2020) eKLR* where the court stated that an appeal should not be parked in court for times on end without any action being taken. He submits that it is only fair and in the interests of justice that the respondents' appeal be dismissed and litigation comes to an end.

Analysis and determination –

13. The issues for determination in the appeal are:
 - a. Whether the firm of Wangechi Gathua Law Advocates is properly on record.
 - b. Whether the appeal ought to be dismissed for want of prosecution.

Whether the respondents' advocates are properly on record-

14. The firm of Wangechi Gathua Advocates filed their notice of appointment on the November 10, 2021. It is to be noted that the respondents in the trial court acted in person and did not have legal counsel on record. Order 9 rule 9 of the *Civil Procedure Rules* provides that:

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court:

- i. Upon an application with notice to all the parties; or
 - ii. (Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
15. As the respondents acted in person at the trial court, they did not require leave of the court before engaging an advocate. In the premises, I find that the firm of Wangechi Gathua Law Advocates is properly on record.

Whether the appeal ought to be dismissed for want of prosecution -

16. Order 42 rule 35 (1) of the *Civil Procedure Rules* provides that:-

Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.

Rule 35 (2) provides:-

If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.

17. Therefore, order 42 rule 35 envisages two scenarios for the dismissal of an appeal for want of prosecution. The first scenario is when an appellant fails to cause the matter to be listed for directions under section 79B of the *Civil Procedure Act* as is envisaged in order 42 rule 11 of the *Civil Procedure Rules*. The second scenario is that if after service of the memorandum of appeal the appeal would not have been set down for hearing, the registrar shall on notice of the parties list the appeal before the judge for dismissal.



18. The above principle has been stated in the case of *Pinpoint Solutions Limited & Another v Lucy Waitibegeni Wanderi (as the legal administrator of the Estate of James Nyanga Muchangi)* [2020] eKLR where the court elaborated on the procedure relating to dismissal of appeals for want of prosecution, saying:-

“The provisions of the law relating to dismissal cannot be read in isolation. The bottom line is that directions must have been given before an appeal can be dismissed for want of prosecution. Indeed, there does not appear to be any penalty where an appellant fails to proceed as per order 42 rule 11 and rule 13 of the *Civil Procedure Rules, 2010*.

This court took the view that an appeal cannot be dismissed before directions had been given. As there was no indication that directions had been given herein, the appeal herein could not be dismissed under order 42 rule 35(1) of the *Civil Procedure Rules*. In any event, there was also no evidence that the registrar had issued a notice under order 42 rule 12 of the *Civil Procedure Rules*. There was also no indication that the lower court file and proceedings had been forwarded to the High Court for the registrar to proceed as aforesaid.”

19. Similarly on the principles governing dismissal for want of prosecution, the court in *Mwangi S Kimenyi v Attorney General & Another, Civil Suit Misc No 720 of 2009* held that:

“When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the act straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all parties- the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether delay is one that gives rise to a substantial risk to a fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the defendant; and 5) what prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.”

20. I have considered the grounds in support of the application, the grounds in opposition thereto and the submissions by the respective advocates for the parties. The court record indicates that the matter was concluded in the trial court on March 13, 2018. The respondents filed the memorandum of appeal on May 4, 2018. The appeal was set down for directions on February 24, 2020 and the court directed that a hearing date be fixed at the registry which date had not been taken by the time the instant application was filed.
21. I have noted from the court record that though the subject application is dated January 4, 2021, the same was not filed with the court until January 5, 2022. The application was supported by the affidavit of the applicant’s counsel sworn on January 4, 2022. It would seem that the application was drafted in January 2021 but was not filed in court until January 2022.
22. I have further noted from the record that the current advocates for the respondents, Wangechi Gathua Advocates, entered their notice of appointment on the November 10, 2021. I have also noted from the court record that the said advocates wrote to the court *vide* a letter dated December 16, 2021 requesting



the deputy registrar to fix the matter down for directions. By the time the instant application was filed on January 5, 2022, the court had not given a date for directions. It would then appear that by the time the application was filed the respondents were waiting to get a response from the deputy registrar on a date for directions. Normally, it is during the directions when parties inform the court on how they wished to proceed with the appeal. It then cannot be said that the respondents had not taken any step towards the hearing of the appeal by the time the instant application was filed on January 5, 2022.

23. Though there has been delay in the manner the respondents have handled the appeal by not complying with the order of the court to take a hearing date at the registry, I do not think that the appeal warrants to be dismissed for want of prosecution. The respondents have engaged a firm of advocates to appear for them in the matter. This connotes an interest to prosecute the appeal. There is no issue raised that a fair trial cannot be conducted in the case due to the delay. The applicants can be compensated by way of costs for the delay.
24. In the premises the application dated January 4, 2021 is dismissed but the applicant will have the costs of the application. The court will proceed to give fresh directions on how the appeal will be disposed of.

SIGNED THIS 14TH SEPTEMBER 2022

J N NJAGI

JUDGE

DELIVERED, DATED AND SIGNED AT NYERI THIS 26TH DAY OF OCTOBER 2022.

By:

HON JUSTICE M MUYA

JUDGE

In the presence of:

Wangeci:for Applicant

Nderi hold brief for Mangu: Respondents

Court Assistant: Kinyua.

